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No. 86-345

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THREE WAY CORPORATION

and

BUDD MOVING SYSTEMS, INC.,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents

BRIEF IN OPPOSITION OF INTERVENOR RESPONDENT UNITED VAN LINES, INC., TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

Intervening Respondent United Van Lines, Inc. ("United" or "Intervening Respondent") objects to the question the Petitioners have presented.

Contrary to Petitioners' statement, the Household Goods Transportation Act of 1980 (HGTA) was enacted as a reaction to the open-entry philosophy contained in the Motor Carrier Act of 1980 (MCA) so as to preserve existing pooling arrangements between van lines and their agents and to place limits on the Interstate Commerce Commission (ICC, Commission) ability to disrupt such arrangements. This is particularly recognized in 49 U.S.C. § 11342(b)(2). Contrary to petitioners' analysis of Section 11342, its emphasis is not to require that the Commission hold hearings on pooling agreements but rather that no such hearings are to be held unless the Commission determines, on an *ex parte* basis, that such a proposed pooling agreement is "of major transportation importance" or "there is substantial likelihood that the agreement or combination will unduly restrain competition." In the case of pooling agreements involving household goods carriers and their agents, such section contains a clearly stated presumption that such agreements or combinations shall be in the public interest and not in undue restraint of competition if such agreement reflects practices that are the same or similar to practices carried out under agreements between such carriers approved by the Commission before the date of enactment of the HGTA.

Viewed in such proper context, the questions posed by the Petition should be stated as follows:

1. Did the Court of Appeals err in sustaining the Commission's decision to approve a modification to an existing pooling agreement, where such pooling agreement was in existence prior to enactment of

the HGTA, and where such modification was for the purpose of preserving the nature of the pooling arrangement as originally approved by the Commission?

2. Were the actions of the Commission, affirmed by the Court of Appeals:

   a. inconsistent with the purposes of the underlying statute;

   b. inconsistent with the Commission's guidelines implementing the HGTA;

   c. inconsistent with the Commission's contemporaneous handling of another van line pooling application;

   d. inconsistent with Commission actions granting to individual carrier-agents independent operating authority competitive with the operating authority held by the van line principal?

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Intervening Respondent United Van Lines, Inc., opposes this petition to seek a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

STATUTE INVOLVED

Petitioners have reproduced at pp. 2-3 of their Petition *a portion* of 49 U.S.C. 11342. Specifically, Subsection (b) (1) has been reproduced, and is identified as the "pertinent part" of the involved statute. The Petitioners' identification of the statute involved, particularly their non-inclusion of a portion of the statute is misleading. The provision cited by Petitioners addresses pooling agreements involving any motor carrier of property. Subsections (b) (2) and (3) are those provisions of the

section dealing specifically with carriers of household goods. Further, Subsection (b) (1) is identified as being a portion of the Household Goods Transportation Act of 1980 (Petition, p. 2). In fact, that subsection was enacted as part of the Motor Carrier Act of 1980. Subsections (b) (2) and (b) (3) were added by the HGTA. Such subsections read as follows:

> (b) (2)—In the case of an application for Commission approval of an agreement or combination between a motor common carrier providing transportation of household goods and its agents to pool or divide traffic or services or any part of their earnings, such agreement or combination shall be presumed to be in the interest of better service to the public and of economy in operation and not to restrain competition unduly if the practices proposed to be carried out under such agreement or combination are the same as or similar to practices carried out under agreements and combinations between motor common carriers providing transportation of household goods, to pool or divide traffic or services or any part of their earnings approved by the Commission before the date of enactment of this paragraph.
>
> (3)—The Commission shall streamline, simplify, and expedite, to the maximum extent practicable, the process (including, but not limited to, any paperwork) for submission and approval of applications under this section for agreements and combinations between motor common carriers providing transportation of household goods and their agents.

STATEMENT OF THE CASE

Intervening Respondent will limit its statement of the case to identifying that part of Petitioners' "Statement" which contains erroneous or misleading references.

First, the case below did not involve the Interstate Commerce Commission's initial interpretation of this particular statutory provision. While there have been nu-

merous decisions of the Interstate Commerce Commission addressing pooling applications of common carriers of property, other than carriers of household goods, the Commission first interpreted the cited statutory provision in the household goods field in Docket No. MC-F-15004, *Atlas Van Lines, Inc.—Pooling Application* (not printed) served July 21, 1983, substantially in advance of the Commission's decision in the proceeding involving United Van Lines, Inc.

Petitioners' second erroneous statement occurs also at p. 3 where the application of United Van Lines, Inc., to modify its existing pooling agreement is identified as a "new pooling arrangement." To the contrary, the opinion of Judge Bork in *Three Way Corp. v. Interstate Commerce Commission, et al.*, 792 F.2d 232 (D.C. Cir. 1986) determined that the amended United Van Lines, Inc., pooling agreement was sufficiently similar to the prior pooling agreement so as to be entitled to the presumption of propriety reflected at 49 U.S.C. § 11342(b)(2), 792 F.2d at 236; Petitioners' Appendix A, p. 10a.

At p. 4 of the Petition it is suggested that the Commission's disposition of the United Van Lines, Inc., pooling agreement amendment was a marked departure from past practice, that is that the Commission had ". . . heretofore carefully evaluated the anticompetitive aspects of pooling agreements on a case-by-case basis. . . ." Petitioners' neglect to note that enactment of the HGTA required this changed method of evaluation of pooling agreement applications and amendments to existing arrangements when circumstances provided for by 49 U.S.C. § 11342 were present. Prior to enactment of § 11342, all pooling applications were the subject of a hearing requirement. Petitioners' Appendix A, p. 6a.

At pp. 6-8 of the Petition assertions are made to support Petitioners' conclusion that the amended pooling agreement of United Van Lines, Inc., was a radical alteration of and departure from its original pooling agreement first approved by the Interstate Commerce

Commission in *Geitz Storage and Moving Co., Inc.—Investigation of Control*, 65 M.C.C. 257 (1957). Petitioners, however, overstate the significance of that portion of the Commission's exhaustive decision originally approving the United Van Lines, Inc., system of operation through pooling with carrier-agents. The Commission concluded in its decision approving the plan that competitive limitations inherent in such a plan were for a purpose—the division and segregation of a portion of the household goods transportation market in order to achieve efficiencies for the benefit of the shipping public.

> As indicated previously, competition between United and its carrier-agents is to some extent restrained by the pooling proposal, although not completely in that each carrier participating will continue to perform transportation under its own operating authority. However, under the proposal, the carriers involved are enabled to operate more efficiently, *each in the field for which it is best fitted.* United is assured of sufficient traffic to perform nationwide, long-distance hauling with a minimum of empty or partially loaded vehicle mileage at the lowest rates consistent with good service, and the carrier-agents can perform expedited, more or less short-haul service immediately available to shippers in the vicinity of their domiciles.

65 M.C.C. at 297. [Emphasis added.] *See also* Petitioners' Appendix A, p. 10a, for a discussion of the consistency achieved by the amendment to the pooling plan with the original plan approved in 1957.

At p. 8 of the Petition, it is asserted that what has been denied to Petitioners is that which they have a right to receive—a full evidentiary hearing with regard to the amendment proposed by United Van Lines, Inc., to its pooling agreement. Ignored by Petitioners is the clear statutory command that no such hearing is desired by Congress where the effect of such modification is so limited so as not to alter in any significant way the scope

of the agreement previously approved and in effect as of the date of enactment of the HGTA.

In attempting to further support their contention, Petitioners at p. 9 attempt to characterize the Commission's decision in the United Van Lines, Inc., proceeding as being inconsistent with that agency's determination to hold a hearing in the previously cited case involving a pooling application of Atlas Van Lines, Inc.[1] Not mentioned by Petitioners is the fact that the cited *Atlas* decision involved an entirely new pooling agreement, as opposed to merely an amendment to an existing one, and further that at the conclusion of the hearing in that proceeding the Interstate Commerce Commission determined that such agreement was not one of major transportation importance and did not unduly impact on competition. *See* Petitioners' Appendix A, p. 8a.

NO REASON EXISTS FOR GRANTING THE WRIT

Rule 17 of the Rules of the Supreme Court of the United States provide the "character of reasons" to be considered in determining whether to grant or deny a Petition for a Writ of Certiorari. The petition for the writ sought here does not fit these categories. Clearly, the decision of the Court of Appeals is not in conflict with the decision of any other federal court of appeals on the same matter nor has a federal question been decided in a way that conflicts with the decision of a state court of last resort. Nothing in the decision by the Court

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[1] Petitioners erroneously identify this proceeding as being reported at 127 M.C.C. 799 (1983). The cited decision, *Atlas Van Lines, Inc.—Pooling*, did not involve the Commission's approval of a pooling application, but rather a decision that it had no jurisdiction over Atlas Van Lines' termination of its previously existing pooling agreement, and that van line's decision to only associate itself with agents which had no ICC authority—that is to say, non-carriers. The Atlas decision cited by Intervening Respondent is most likely that which Petitioners intended to cite and which involved Atlas' replacement pooling plan with carrier-agents who, by agreement with Atlas, could only hold specifically limited types of Interstate Commerce Commission operating authority.

of Appeals calls for an exercise of this Court's power of supervision in that no departure from the accepted and usual course of judicial proceedings exists. Nor has the Court of Appeals decided an "important question of federal law" which has not been but should be settled by this Court, nor is there any conflict between the decision of the Court of Appeals and any decision of this Court.

Petitioners call this case one of "first impression" and urge granting of the Petition on that basis. While Intervening Respondent would agree that this Court has yet to evaluate the cited provisions of the HGTA, the context of the decision of the Interstate Commerce Commission at issue must be kept in perspective. As noted, what was at issue was a minor modification to an already existing pooling arrangement, the impact of which directly affected no more than four carrier-agents of the more than 600 agents participating with United Van Lines, Inc., in the transportation of household goods. *See* Petitioners' Appendix A, pp. 3a, 5a, N.2. Moreover, as it demonstrated in the decision of the Court of Appeals, the ICC had already issued a decision following the award of a "hearing" and which interpreted the very provisions of the HGTA at issue here. Petitioners' Appendix A, pp. 7a, 8a. For the Commission to have granted a hearing to Petitioners with regard to the United Van Lines, Inc., modification to its pooling arrangement would have been clearly inconsistent with the statutory provision at issue and its legislative history.

I. THE COURT OF APPEALS WAS CORRECT IN AFFIRMING THE DECISION OF THE INTERSTATE COMMERCE COMMISSION. TO DO OTHERWISE WOULD HAVE BEEN INCONSISTENT WITH THE HOUSEHOLD GOODS TRANSPORTATION ACT OF 1980

When reduced to its essentials, Petitioners' argument is one of claimed inconsistency. Petitioners argue that the decision of the Court of Appeals affirmed a decision of the ICC inconsistent with the provisions of the HGTA,

inconsistent with the National Transportation Policy as embodied in the MCA, inconsistent with that agency's decision in *Atlas, supra.*, and inconsistent with its own regulatory implementation of the HGTA, *Practices of Motor Common Carriers of Household Goods*, 132 M.C.C. 599 (1981). The decision of the Commission and the decision of the Court of Appeals in affirmation are none of those things.

Initially, we note that the decision of the Court of Appeals essentially affirms an interpretation by the ICC of a portion of a statute, the HGTA, by which that agency is commanded by Congress to regulate a portion of the motor carrier industry. As such, that agency's interpretation is entitled to due deference, accorded it by the Court of Appeals. *Chemical Manufacturers Association, et al. v. Natural Resources Defense Council*, 470 U.S. 116, 124 (1985); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 461 U.S. 956 (1984). Petitioners assert at pp. 11-12 that the Court of Appeals "recognized" that the HGTA and the Motor Carrier Act of 1980 sought to foster competition within the motor carrier industry, and that the decision of the Commission thwarts such procompetitive philosophy by allegedly allowing Intervening Respondent United Van Lines, Inc., to engage in "naked competitive restraint," and in a manner incompatible with the purposes of the cited statutes.

The decision of the Court of Appeals correctly commences its analysis of Petitioners' "consistency/inconsistency" argument with reference to the original decision of the Commission approving the pooling agreement of United Van Lines, Inc. The 1957 decision in *Geitz Storage & Moving Co.—Investigation of Control—United Van Lines, Inc., supra.*, allows carrier-agents to continue to have the use of their operating authorities issued independently to them by the ICC but also notes that in 1957 such operating authority, by Commission practice, only gave to such carrier-agents the ability to operate in-

dependently in shorthaul transportation services located in the vicinity of their domiciles. Petitioners' Appendix A, p. 10a, citing 65 M.C.C. at 270 and 297. The Court also notes that this situation changed dramatically with enactment of the MCA, Pub. L. No. 96-296, 94 Stat. 793, and the HGTA, Pub. L. No. 96-454, 94 Stat. 2011. While both Acts did seek to install a system of competition and reduced regulation, only the MCA had the express purpose of making it easier for carriers to enter the interstate market or expand their operations by acquisition of broad operating authority. Petitioners' Appendix A, pp. 3a-4a. The Court also notes at p. 10a of Petitioners' Appendix A that until passage of the MCA none of United's carrier-agents possessed independent nationwide operating authority. In such context, the Court of Appeals recognized that the United modification to its pooling plan was an effort to preserve, to the maximum degree possible, the original purposes of the pooling plan consistent with the new provisions of the HGTA. At p. 10a of Petitioners' Appendix A, the Court noted,

> The United amendment does not return the system to the status quo ante but does move in that direction in order to avoid the inefficiencies created by carrier-agents with their own nationwide authority who are able to use United's reputation and services for their own accounts without paying for those benefits. United's amendment affects only a small number of carriers and would actually leave the competitive posture of the United system essentially unchanged, something Congress felt was acceptable when it passed Section 11342(b)(2).

Further, the Court of Appeals relied upon that part of 49 U.S.C. § 11342, which deals specifically with household goods carriers, and not identified by Petitioners as "relevant" in the Petition.

The Court of Appeals carefully considered the intent of Congress in enacting the HGTA vis-a-vis the pooling activities engaged in as part of the household goods trans-

portation industry. The Court first noted that prior to enactment of the MCA the Commission was required to hold a hearing to review all petitions seeking the approval of a pooling agreement amendment. Petitioners' Appendix A, p. 6a. It was the MCA (and not the HGTA) which enacted 49 U.S.C. § 11342(b)(1) identified by Petitioners as the only relevant statutory provision. The Court of Appeals recognized that the purpose of the changes to this provision were for obtaining approval of such pooling agreements without the necessity for a hearing and providing for expedited review of such agreements. *Id.* The Commission is given, by that section, the specific authority to approve pooling applications on an ex parte basis, and without a hearing, unless the Commission determines by such preliminary review that the agreement is of major transportation importance and whether there is substantial likelihood that such agreement would unduly restrain competition. The HGTA, the Court advises, further refined and made more expeditious this review process by presuming that pooling agreements which are the same or similar to agreements in existence prior to enactment are in the public interest and do not unduly restrain competition. *Id.* at 7a.

In concluding that the Commission was correct in its determination regarding the United Van Lines, Inc., pooling plan modification, the Court of Appeals analogized such decision with that of the Commission in *Atlas Van Lines, Inc.—Pooling Application*, No. MC-F-15004 (I.C.C. July 15, 1983) (unpublished). In that case, decided prior to the decision reached by the Commission in the United Van Lines, Inc. proceeding, a hearing was ordered, Atlas having terminated its prior pooling arrangement and having filed an application to begin a new pooling plan with carriers which had agreed to independently operate only under very severely circumscribed ICC operating authorities. See Petitioners' Appendix A, 7a-8a. Having conducted the hearing, the Commission concluded that the proposed agreement was not of major importance nor

was it likely to adversely affect competition. *Id.* Having examined the basis for the Commission's decision in that case, the Court of Appeals concluded with regard to the United Van Lines, Inc., proposal,

> Further, Congress has directed the Commission to "expedite, to the maximum extent practicable" the process and approval of applications. It, therefore, would not be in keeping with the HGTA to require the Commission to ignore experience gained in the process of reviewing these matters. Having recently decided that the analogous *Atlas* proposal was not of major transportation importance and would not unduly restrain competition, it was not necessary for the Commission to hold hearings on United's proposal. Cf. *National Classification Committee v. I.C.C.*, 779 F.2d 687, 693 (D.C. Cir. 1985).

Id. at 9a.

The Court then concluded that the United Petition for Modification was also entitled to the presumption of validity under 49 U.S.C. § 11342(b)(2) in that its modified pooling plan was far less restrictive than other arrangements in effect for competing national van lines and which had been in effect at the time of enactment of the HGTA. *Id.* at pp. 9a-10a. The Court also concluded that United's modified plan was entitled to the presumption because it was sufficiently similar to its original pooling plan *in operative effect.* The Court noted that the original agreement did allow carrier-agents to operate to the fullest extent of their Commission-granted authority, but that such agreement had been drafted at a time when all parties and the Commission knew that such agents were ineligible to conduct nationwide operations. The Court noted that it was the open-entry policies of the MCA which had allowed carrier-agents to upset this balance which the amendment to the United Van Lines, Inc., pooling plan was designed to retrieve. *Id.* at p. 10a.

Thus, the Court of Appeals recognized that while the MCA had vastly increased the opportunity for the obtain-

ing of additional operating authority, the HGTA by amending 49 U.S.C. § 11342 in effect balanced such open-entry provisions by assuring continuation and preservation of existing pooling plans.

Support for the validity of the Court of Appeals affirmance of the Commission decision is found in a recent and exhaustive discussion of the effect of the HGTA upon van line/agent relationships, and in the wake of the open-entry policies fostered by the MCA. As pertinent to the Petition for a Writ of Certiorari, Intervening Respondent United Van Lines, Inc., references this Court to the decision of the United States District Court for the District of Columbia in *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 597 F. Supp. 217 (D.D.C. 1984), *aff'd Rothery Storage & Van Co., et al. v. Atlas Van Lines*, 792 F.2d 210 (D.C. Cir. 1986). While the decision Judge Oberdorfer granted a motion for summary judgment regarding an antitrust claim brought against Atlas Van Lines, the analysis of this van line/carrier-agent relationship as it had been affected by the HGTA is instructive:

> This memorandum has already described the "facts peculiar to' the van line and moving industry, and the recent legislative and regulatory changes leading to the new Atlas policy. Prior to deregulation, Atlas had given its carrier-agent companies permission to use the Atlas infrastructure to compete with Atlas itself, for their own accounts, within the boundaries set by federal regulations and ICC oversight. Classic agency law, however, gives a principal the prerogative of withdrawing such permission if convenient to protect the principal's interest. *See Restatement of Agency*, 2d § 1(1)14 N, 393-394. Nothing in the legislative history of Congress' deregulation of the household moving goods industry suggests that when Congress removed the regulatory restrictions on carrier-agent independent operations, it added a restriction barring van lines from exercising this prerogative. Indeed, the legislative

> history of the measure shows just the opposite: that Congress had no intention of disturbing the ability of a van line to reach agreements enforcing "the fiduciary duty of loyalty of an agent not to compete with its principal concerning the subject matter of the agency." S. Rep. 497, 96th Cong. 1st Sess. 8 [footnote omitted]. Congress may well have speculated that by widening the regulatory boundaries on carrier-agent independent operation, it would have triggered more independent operation of that sort. However, when it lifted those restrictions, it did so —consistent with the free market philosophy supporting deregulation in general—to create an *option* not a *mandate* [footnote omitted, emphasis in original]. Congress, thus, left each individual van line free to fashion its own response to deregulation—or, in Atlas' case, to the prospect of widescale price competition from its own agents using the van line's own infrastructure. Atlas' choice was to protect against the further diversion of its own business infrastructure in this fashion, and instead to strengthen its competitive position by returning to a traditional agency arrangement whereby its agent companies serve Atlas alone. As such, the new Atlas policy [a policy of canceling its pooling agreement within which there were no restrictions on carrier-agents competition with the van line] plainly had a legitimate business purpose, and is consistent with policies chosen by Congress with respect to the choice between regulation and competition in this industry.

597 F. Supp. at 232-233.

Nor is the decision of the Court of Appeals affirming that of the ICC "inconsistent" with the Commission's decision in *Practices of Motor Common Carriers of Household Goods*, 132 M.C.C. 599 (1981). Petitioners vigorously assert that the language of such decision, quoted at pp. 9, 12 and 14 of the Petition establishes a policy which specifically prohibits the sort of modification to an existing pooling plan proposed by United Van Lines, Inc., and approved by that Commission. The section of the cited

Commission decision from which such language is taken renders it unsupportive of the conclusion advanced by Petitioners. Prior to the cited decision of the Commission, that agency had promulgated certain rules, specifically 49 C.F.R. §§ 1056.18 and 1056.21. Such rules had the effect of requiring carrier-agents, when performing services pursuant to their independently issued operating authorities and in direct competition with their van line principals to charge the identical rates which the van line had published in tariffs covering such service. The Commission concluded that such uniformity of rates provisions should be deleted so that to the extent carrier-agents would engage in direct competition with their principal van lines, they should be free to charge whatever rate they wished. However, as was noted by the Commission in its decision approving the modification proposed by United Van Lines, Inc. to its pooling agreement and by Judge Oberdorfer in his opinion in the cited decision involving Atlas Van Lines, Inc., the van lines remain free to determine the limits by which it will permit such direct competition. Petitioners' Appendix A, pp. 23a-24a; 597 F. Supp. at 532. Again, there exists no inconsistency.

The final inconsistency argued by Petitioners concerns the issuance to them by the ICC of nationwide operating authorities on the basis of public interest conclusions while at the same time approving United Van Lines, Inc.'s proposal allegedly placing limits on the use which might be made by Petitioners of those authorities. At p. 17 of the Petition it is argued that ". . . something is amiss when a regulatory agency makes public interest findings that the public needs the service of individual carriers . . . at the same time summarily immunizes a private entity's program to restrict or restrain those public franchises." Firstly, and as was noted by the Court of Appeals, no modification to the certificates was made, but rather the use which might be made by Petitioners of such certificate within Petitioners' agency

status with United Van Lines, Inc. As the Court noted, "Petitioners need not modify the use of their operating authorities unless they chose voluntarily to remain with United." Petitioners' Appendix A, p. 11a. Moreover, the certificates issued to Petitioners were issued to them as independent business concerns, and not as agents of United Van Lines, Inc. By voluntarily selecting to participate in a pooling agreement as opposed to operating their nationwide certificates on a totally independent basis, any carrier-agent choosing to remain with United Van Lines, Inc., is choosing to have its independent operations modified as approved by the ICC when the modification to the pooling plan was itself sanctioned.

CONCLUSION

There does not exist, either in the plain language of 49 U.S.C. § 11342(b) nor in the legislative history of the HGTA nor in any ICC decision or policy pronouncement, support for Petitioners' essential argument—that the principles of agency law have no application to pooling agreements involving interstate household goods carriers, and that such law must be interpreted as requiring van lines to encourage, assist, and subsidize direct competition between itself and carrier-agents which have obtained, as a result of the MCA, nationwide operating authority. While the MCA certainly afforded such carriers that opportunity—that is, to obtain nationwide operating authority—the HGTA was for the specific purpose of ensuring that traditional pooling agreements controlled by the van lines would be preserved. In fact, all of the sources, which Petitioners urge as support for their position, require precisely the opposite conclusion. This the Court of Appeals saw clearly and viewed the action of the Commission approving the modification to the pooling plan of United as being precisely the sort of adjustment to a pooling relationship which Congress intended to be put into effect on an ex parte basis and without a hearing.

Intervention of this Court, in the way urged by Petitioners, would in fact be a thwarting of clearly articulated Congressional intent. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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